COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID R. DODD, DAVID E. DODD, and
DIANN D. MARTIN,

Appellants/Plaintiffs Below,

vs.

Circuit Court of Berkeley County
Civil Action No. 02-C-320
Docket number 071070

POTOMAC RIVERSIDE FARM, INC.;
LOGAN D. WANNAMAKER, individually and as a
Director of Potomac Riverside Farm, Inc.;
MARJORIE LEE WANNAMAKER, individually and as
a Director Potomac Riverside Farm, Inc,;
NATIONAL CITY BANK, a foreign
corporation doing business in West Virginia,
as Trustee of Voting Trust Agreement of Potomac Riverside Farm, Inc.
and as Trustee of Edwin D. Dodd Trust; and
SARAH D. KAUFFMAN, as President of Potomac Riverside Farm, Inc.

Appellees/Defendants Below.

BRIEF OF APPELLEES, POTOMAC RIVERSIDE FARM, INC., LOGAN D. WANNAMAKER, MARJORIE LEE WANNAMAKER, and NATIONAL CITY BANK

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I. NATURE OF PROCEEDINGS AND RULINGS BELOW

On October 26, 2005, this matter proceeded to evidentiary hearing before a Special Commissioner pursuant to the dissenter's rights statutes in effect in 2001 and in particular W.Va. Code § 31-1-123(e)(1974). The circuit court's charge to Commissioner Bean was for him to arrive at a "...recommended decision on the question of fair value of plaintiffs' shares...". *See* Order, April 13, 2005.

After a two-day hearing, Commissioner Bean recommended a fair value of $952.37 per share. This recommended fair value was $583.88 per share less than the dissenting shareholders' (hereinafter "dissenters") requested award of $1,536.25 per share and only $116.86 per share greater than the statutory offer of $835.51 per share extended by Potomac Riverside Farm, Inc. (hereinafter the "corporation").

Commissioner Bean's valuation of the corporate shares is a result of his analysis of the corporation's assets and liabilities. The liabilities were agreed upon and their value not in dispute. The shareholders did not, however, agree upon the value of the corporation's sole tangible asset, the family farm. The determinative question for the Commissioner thus became; "What is the value of the only significant asset of the corporation, the family farm?"

The farm's value was derived from all the evidence offered at the two-day hearing before the Commissioner. The Commissioner relied more heavily upon an appraisal offered by the corporation (the McPherson appraisal) which valued the farm at $1,250,000 as of August 30, 2001, than the competing appraisal (the McCray appraisal) offered by the dissenters. *See* Special Commissioner's Recommended Findings, December 5, 2005. Per the Commissioner's recommended findings, his valuation was also influenced by the sale of the farm for the sum of $1,399,900 to a willing buyer as part of an arms length transaction

on June 12, 2003. On April 6, 2006, the trial court adopted the findings of the Commissioner valuing the farm at $1,400,000 as of August 31, 2001. *See* Order, April 6, 2006. Using this value, the Commissioner then computed an ultimate per share fair value of $952.37, which was again adopted by the trial court. *See* Order, April 6, 2006.

After he fulfilled the charge given to him to determine fair value, Commissioner Bean went on to recommend an award of interest. In making recommendations on the interest rate to be employed in this case, Commissioner Bean exceeded the limits of his authority under the trial court's order of appointment. *See* Order, April 13, 2005. Commissioner Bean was appointed to act as an appraiser under W.Va. Code § 31-1-123(e) which provides in relevant part:

> The court may, if it so elects, appoint one or more persons as appraiser to receive evidence and *recommend a decision on the question of fair value*. The appraisers shall have such power and authority as shall be specified in the order of appointment...

W.Va. Code § 31-1-123(e)(emphasis added).

In its order of April 13, 2005, the trial court charged Commissioner Bean with the narrow duty "to provide a recommended decision on the question of fair value of plaintiffs'[dissenters'] shares..." *See* Order, April 13, 2005.

Because of his limited role in this case, Commissioner Bean was unaware of many of the circumstances surrounding the proceedings. He had no knowledge of the dissenters' vexatious filing of multiple *lis pendens* designed to stop and/or grossly delay the sale of the corporate farm for $1,399,900 ($100 less than the $1,400,000 value placed upon it by Commissioner Bean). Nor was the trial court's imposition of a constructive trust upon the

proceeds from the sale of the farm, at the insistence of the dissenters, known to the Commissioner. The dissenters imposition of this constructive trust severely limited the ability of the corporation to invest the sale proceeds and prohibited its use for anything other than approved corporate liabilities (i.e. built in gain tax). Similarly, he was unaware of the enormous time and effort exhibited by the dissenters in resisting the ultimate referral of the matter to a special commissioner for a fair value determination. The extreme and lengthy resistance of the dissenters to that forum was knowledge unique to the trial court. The minority shareholders did not seek a speedy valuation of their shares; Rather, they initially brought this action to thwart and permanently stop the sale of the farm by the corporation. *See* Transcript, January 31, 2003. In hindsight, it is the opinion of the corporation that the Dissenters engaged in an abuse of process. Dissenters sought to use this action to acquire the family farm for their own purposes. The Dissenters did not file intending to rapidly seek a determination of their per share value under the dissenter's rights statute. They repeatedly resisted those remedies. They opposed all of the motions initiated by the corporation to have the property sold and a Special Commissioner appointed to make a recommendation of fair value under W. Va. Code § 31-1-123 (1974)[1], including the following:

1.	Defendants' Combined Motion and Memorandum to Expunge Lis Pendens and Limit Remedy (Sought a lifting of the lis pendens and the appointment of a Special Commission)	11/04/2002

[1]Although subsequently amended in 2002, the statutory scheme effected in 1974 remained applicable to the corporate action undertaken in 2001 and being challenged by the minority shareholders in these proceedings.

2.	Defendants' Reply in Support of Defendants Combined Motion and Memorandum to Expunge Lis Pendens and to Limit Remedy	12/19/2002
3.	Defendants' Request for Oral Hearing	01/06/2003
4.	Defendants' Opposition to Motion for Extension of Stay	02/27/2003
5.	Response to Petition for Writ of Prohibition	03/03/2003
6.	Motion of Defendant, National City Bank for Partial Release of Funds from Constructive Trust	08/30/2004
7.	Defendants' (Renewed) Motion for Reference to a Court Appointed Commissioner for Recommended Decision on the Question of Fair Value	01/10/2005
8.	Defendants' Motion for Partial Summary Judgment on the Absence of Fraud, Illegality or Oppression in the Sale of PRF, Inc. (Seeking, in part, a Commissioner's appointment)	01/10/2005
9.	Defendants' Reply in Support of Motion for Reference to Court Appointed Commissioner	02/18/2005
10.	Defendants' Opposition to Plaintiffs' Motion for Leave to Amend	02/21/2005
11.	Defendants' Opposition to Plaintiffs' Motion to Amend Order of April 13, 2005	05/13/2005

The fair application of W.Va. Code § 31-1-123, the order of appointment, and due process required the trial court to disregard Commissioner Bean's recommendations on interest, costs and counsel fees and allow the parties the opportunity to have a fully informed trier of fact address these issues.

The award of interest also necessarily took into account the parties behavior to date, including the wrongfully filed *lis pendens* necessitating closing delays, the dissenters' repeated opposition to the appointment of a special commissioner, the offers of judgment,

and the court's order requiring the sale proceeds to be held in a constructive trust, limiting its use and investment opportunities.

The trial court awarded interest at varying rates upon various portions of the award. It was not done randomly, but with much deliberation and reasoning. When read as a whole, the ultimate result is the equivalent of a blended interest rate which is fair and equitable under ALL THE CIRCUMSTANCES.

On October 5, 2006, the trial court entered an order awarding the dissenters: 1) interest of 10% on $116.86 of the per share award, that being difference between the statutory per share offer made by the corporation and the Commissioner's recommended per share value, from August 30, 2001(the vote to sell the farm) to the entry of the order; 2) interest of 1.674% on $835.51 of the per share award, that being the amount of interest the corporation was permitted to earn on the sale proceeds invested under the constructive trust imposed at dissenters' insistence, from June 12, 2003 (the date of sale) through the entry of the final order; and post judgment interest on the entire award in accordance with W.Va. Code § 56-6-31.

While the dissenters have creatively represented this as an appeal from an order of October 5, 2006, that order only concludes the proceedings as to the interest rates and costs to be awarded under the dissenter's rights statute. This appeal is timely as to the October 5, 2006, Order and its findings and awards. However, the dissenters also seek to bootstrap an appeal of the April 6, 2006, Order which concludes the proceedings as to the fair value of the corporate shares under the dissenter's rights statute. This appeal is untimely as to the April 6, 2006, Order as a petition challenging those findings and awards was not filed within four (4) months of its entry.

II. STATEMENT OF FACTS

1. Appellants are three (3) shareholders of Potomac Riverside Farm, Inc.(hereinafter dissenters).

2. Appellees consist of Potomac Riverside Farm, Inc.(the corporation), National City Bank (the voting trust trustee), and three (3) members of the corporation's Board of Directors.

3. The corporation had essentially one (1) tangible asset. It owned two parcels of real estate in Berkeley County, West Virginia, collectively referred to as the "farm".

4. The Special Commissioner found that "Plaintiffs [dissenters] were emotionally tied to the real estate...and attempted to do what they could, over the years, to retain the [property]." *See* Special Commissioner's Recommended Findings, December 5, 2005, p. 11.

5. The Commissioner heard testimony that the Dodd family owned the farm for seven generations and it never yielded a monetary return. It meant different things for the family. It was not used equally by all shareholders. For some it was a vacation spot, for others a memory, for some simply a poor investment. *See* Special Commissioner's Recommended Findings, December 5, 2005.

6. In 1997, the farm appraised for $1,120,000. *See* Respondent's Hearing Exhibit 13B.

7. On January 2, 2001, the farm appraised for $1,250,000. *See* Respondent's Hearing Exhibit 11B.

8. On August 30, 2001, dissenters objected to the sale of the farm, but the majority shareholders approved the sale. *See* Special Commissioner's Recommended Findings, December 5, 2005, p. 2.

9. On March 21, 2002, WV Hunter, LLC offered to purchase the farm for $1,399,900. *See* Respondent's Hearing Exhibit 17.

10. On July 8, 2002, dissenters filed their complaint and recorded a *lis pendens* against the farm. *See* Complaint.

11. On July 17, 2002, dissenters amended their complaint to prevent the sale of the farm to WV Hunter, LLC. *See* Complaint.

12. On July 31, 2002, WV Hunter, LLC signed a contract to purchase the farm for $1,399,900. *See* Respondent's Hearing Exhibit 7B.

13. On January 31, 2003, the Court ordered the removal of the *lis pendens* and ordered that dissenters' sole remedy, if any, would be monetary damages. *See* Order, January 31, 2003.

14. On June 12, 2003, WV Hunter, LLC finalized its purchase for $1,399,900. *See* Respondent's Hearing Exhibit 14B.

15. On April 13, 2005, the court ordered the appointment of a Special Commissioner to provide a recommended decision on the question of fair value of dissenters' shares. The court directed the Commissioner to value the shares as of September 7, 2001 (corrected to August 30, 2001, by stipulation of the parties), that being one (1) day prior to the day the shareholders voted to approve the proposed corporate action. *See* Order, April 13, 2005; Special Commissioner's Recommended Findings, December 5, 2005, p. 2.

16. The court's April 13, 2005 Order also determined that W.Va. Code § 31-1-123(2001), repealed by Acts 2002, c. 25, 2d Ex. Sess. Eff. Oct. 1, 2002, would still apply to the case, *sub judice*. *See* Order, April 13, 2005.

17. On August 29, 2005, Commissioner Bean filed a Notice of Hearing to make recommended findings on the question of fair value of dissenters' stock as of September 8, 2001 (corrected to August 30, 2001, by stipulation of the parties).

18. On October 26, 2005, Commissioner Bean commenced a two (2) day evidentiary hearing.

19. On December 6, 2005, Commissioner Bean submitted his recommended findings to the trial court.

20. In his recommended findings, Commissioner Bean made the following findings of fact and conclusions of law:

a. It is inappropriate, as a matter of law, to reduce the value of a minority shareholder's shares based on minority and marketability discounts. (Special Commissioner's Recommended Findings, December 6, 2005, p. 7).

b. The combined sale of the parcels did not prejudice the farm assets. (*Id.* at 10.)

c. The Commissioner heard expert testimony from two real estate appraisers concerning the farm. (*Id.* at 8.) Norman McCray was the petitioners dissenting shareholders' appraiser and Terence McPherson was the appraiser for the corporation (*Id.*)

d. Of the two imperfect appraisals, the Commissioner found that the McPherson Appraisal was the most convincing. (*Id.* at 10.) Mr. McPherson valued the farm at $1,399,900 at the time of closing on June 12, 2003 and $1,250,000 as of August 30, 2001. (Defs. Suppl. Obj. at 2.)

e. The Commissioner found the McCray appraisal unpersuasive because it did not satisfactorily account for the flood plain and the Railroad

Easement. (Special Commissioner's Recommended Findings, December 6, 2005, pp.11-12.) In addition, the listing he used was not comparable. (*Id.* at 12.) Moreover, it was obvious to the Commissioner that David Dodd procured Mr. McCray for the purposes of litigation and had extensive contact with him throughout the appraisal process. (*Id.*)

f. The Commissioner valued the farm at $1,400,00 and valued the other farm assets at $15,234. (*Id.*)

g. The Commissioner determined that the farm's liabilities were $396,196 as of August 30, 2001. (*Id.* at 14.)

h. The Commissioner subtracted the farm's total assets of $1,415,234 from the farm's liabilities to arrive at a net worth of $1,019,038 as of August 30, 2001. (*Id.*)

i. The Commissioner divided the net worth from 1070 total shares to find the fair value of $952.37 for one farm share. (*Id.*)

j. Under the heading, "Other Matters," the Commissioner also determined that "eight percent [interest] feels right" because the Defendants' expert cited that as a conservative interest rate and the statutory interest rate is ten percent. (*Id.* at 14-16.)

23. On January 17, 2006, the corporation objected to the Commissioner's recommended interest and the assessment of costs against the corporation.

24. On February 15, 2006, the corporation objected to the Commissioner's failure to discount the shares for their lack of marketability and minority status. The corporation also objected to the Commissioner's recommended value of the farm as it should have been valued at $1,250,000 as of August 30, 2001, not $1,400,000, which represented the farm's sale price almost two (2) years later (June 12, 2003).

25. On February 17, 2006, dissenters objected to the Commissioner's recommended value for the farm, arguing that the Commissioner "could have determined

the value of the property in whatever manner he deemed appropriate, rather than being compelled to choose one expert over the other." (Pls. Obj. at 3.)

26. The Commissioner exceeded the scope of his appointment and authority in addressing interest rates and matters beyond the per share fair value.

27. On April 6, 2006, the trial court entered a Final Order adopting the Commissioner's recommended fair value of $952.37 per share.

28. On October 5, 2006, the trial court entered a Final Order addressing costs, interests and fees.

III. ASSIGNMENT OF ERROR AND STANDARDS OF REVIEW

A. Did the Trial Court Abuse its Discretion in its Award of Interest Under W. Va. Code § 31-1-123(e) (2001)?

No. Challenges to a circuit court's conclusions and ultimate disposition after a bench trial are reviewed under an abuse of discretion standard. *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va.329, 480 S.E. 2d 538 (1996). Similarly, in reviewing a trial court's award of prejudgment interest, an abuse of discretion standard applies. *Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147(1995). A trial court's determination in an appraisal proceeding brought by dissenting shareholders will likewise only be overturned if the trial court abused its discretion. *See Rapid-American Corporation v. Harris*, 603 A. 2d 796 (Del. 1992); "Under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices". *Gribben*, at 159.

B. Is an Appeal of the April 6, 2005, Final Order Adopting the Recommended Per Share Value of the Dissenters' Shares Timely?

No. This Court has a *sua sponte* duty to determine whether the issues presented were timely filed. *Molen v. Stump*, 2007 WL 1660824, W.Va., June 6, 2007 (No. 33220) (per curium); *See* Syl. Pt. 1, in part, James M.B. v. Carolyn M., 193 W.VA. 289, 456, S.E.2d 16 (1995) ("[T]his Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction.").

"...This Court has the inherent power and duty to determine unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking.]" *Molen* at 3, *citing James M.B., v. Carolyn M.*, 193 W.Va. 289, 456, S.E.2d 16. *See* Syl. Pt. 2, *State ex rel. Davis v. Boles*, 151 W.Va. 221, 151 S.E.2d 110 (1966) ("An appellate court is without jurisdiction to entertain an appeal after the statutory appeal period has expired."); *Cronin v. Bartlett*, 196 W.Va. 324, 326, 472 S.E.2d 409, 411 (1996) ("[T]he appeal period is jurisdictional.").

C. Was the Trial Court Clearly in Error in Adopting the Special Commissioner's Recommended Factual Findings as the Farm's Value Which was Subsequently Used to Compute the Fair Value of the Dissenters' Shares Under W. Va. Code § 31-1-123 et seq.?

No. This appeal requires the review of the findings of fact and conclusions of law recommended by a special commissioner and adopted by the trial court. "The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." *Napier v. Compton*, 210 W.Va. 594, 558 S.E.2d 593 (2001); A two-pronged deferential standard of review is applicable. The final order and the ultimate disposition are

reviewed under an abuse of discretion standard and the underlying factual findings are reviewed under a clearly erroneous standard. *Id.* Thus, the court's decision to value the corporate asset (the family farm) at $1,400,000 as of August 31, 2001, may not be disturbed unless it is clearly erroneous. The per share award of $952.37 which is based thereupon, may not be disturbed unless the circuit court abused its discretion in adopting the commissioner's recommendation.

IV. AUTHORITY CITED

STATUTES:

W.Va. Code § 31-1-123(e)(1974)

W.Va. Code § 56-6-31

CASE LAW:

A. West Virginia

Blair v. Core, 20 W.Va. 265 (1882)

Dorm v. Heck's Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991)

Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 538 (1996)

Hensley v. West Virginia Dep't of Health and Human Resources, 203, W.Va. 456, 508 S.E.2d 16 (1998)

King v. Ferguson, 198 W.Va. 307, 480 S.E.2d 516 (1996)

Loar v. Poling, 107 W.Va. 280, 148 S.E. 114 (1929)

Monroe v. Hurry, 72 W.Va. 821, 79 S.E. 830 (1913)

Napier v. Compton, 210 W.Va. 594, 558 S.E.2d 593 (2001)

Public Citizen, Inc. v. First Nat'l Bank in Fairmont, 198 W.Va. 329, 480 S.E. 2d 538 (1996)

Sisson v. Seneca Mental Health Retardation Council, Inc., 185 W.Va. 33, 404 S.E.2d 425 (1991)

Smith v. West Virginia State Bd. of Ed., 170 W.Va. 593, 295 S.E.2d 680 (1982)

Taylor v. Miller, 162 W.Va. 265 at page 269, 249 S.E.2d 191 at 194 (1978)

B. Other Jurisdictions

Blake v. Blake Agency, Inc., 107 A.D.2d, 139 (NY 1985)

E.I. Fleischman Lumber Corp. v. Resources Corp., 114 F.Supp. 843 (D.Del. 1953)

Gaffin v. Teledyne, Inc., 611 A.2d 467 (Del. 1992)

Gasperin v. Reeves, 664 So. 2d 1062 (Fla. App. 2 Dist. 1995)

Gaston v. Tillery, 900 P.2d 1012 (Okla. App. 1995)

Hallow v. Filiyaro, 526 N.W.2d 631(Minn. App. 1995)

Hayward v. Green, 88 A.2d 806 (Del. Supr. 1952)

In the Matter of Seagroatt Floral Co. Inc., 167 A.2d 586

Rapid-American Corp. v. Harris, 603 A.2d 796 (Del.1992)

Rose Hall Ltd., v. Chase Manhatten Banking, 566 F. Supp.1558 (D.Del. 1983), aff'd 740 D.2d 956 (3rd Cir. 1984)

Severn v. Sperry Corp., 212 Mich. App. 406, 538 N.W.2d. 50(1995)

Uniroyal Goodrich Tire Co. v. Mercer, 111 Nev. 318, 890 P.2d 785(1995)

V. ARGUMENT

A. The Interest Rates Are Fair and Equitable Under All the Circumstances

Commissioner Bean was appointed to act as an appraiser under W.Va. Code § 31-1-123(e) which provides in relevant part:

> The court may, if it so elects, appoint one or more persons as appraiser to receive evidence and *recommend a decision on the question of fair value.* The appraisers shall have such power and authority as shall be specified in the order of appointment...

W.Va. Code § 31-1-123(e)(emphasis added).

In its Order of April 13, 2005, the circuit court charged Commissioner Bean with the narrow duty "to provide a recommended decision on the question of fair value of Plaintiffs' [dissenters'] shares..." *Id.* In making recommendations on the interest rate to be employed in this case, Commissioner Bean exceeded the limits of his authority under the trial court's order of appointment. The law has long held that the authority of a Commissioner must be specifically conferred by decree. *See Loar v. Poling*, 107 W.Va. 280, 148 S.E. 114 (1929); *Monroe v. Hurry*, 72 W.Va. 821, 79 S.E. 830 (1913); *Blair v. Core*, 20 W.Va. 265 (1882). The court properly refused to accept his recommendations and by order of October 5, 2006 made an independent finding as to the same considering **all the circumstances** of the case.

The purpose of an appraisal action is not to punish. There is no punitive aspect to an appraisal proceeding. *Rapid American Corp. v. Harris*, 603 A. 2d 796 (Del. 1992). A court must therefore be careful to only award interest which fairly compensates the dissenting shareholders during the pending appraisal action. *Id.* at 808. The appraisal statutes are intended to compensate dissenting shareholders for the return they would otherwise have had on their shares if the proposed corporate action had not transpired, and nothing more. *Id.*

The circuit court's award of interest is to be consistent with the circumstances and events arising throughout the litigation. An allowance of interest falling within equity's

jurisdiction is not a matter of right, but a matter within the discretion of the court. *See Hayward v. Green*, 88 A.2d 806 (Del. Supr. 1952); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467 (Del. 1992).

W.Va. Code § 31-1-123(e) provides for the inclusion of "an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances from the date at which the vote was taken on the proposed corporate action to the date of payment." This provision for "fair and equitable" interest allows a court to adjust an award of fair value for the time value of money through an award of interest. By receiving a time value adjustment in the form of interest, the dissenting shareholders will be compensated for the return they would otherwise have received on their shares.

As pointed out in *Blake v. Blake Agency, Inc.*, 107 A. D. 2d, 139 (NY 1985), a case relied upon by dissenters, "the appropriate interest rate is to be determined by the court." Later, *In the Matter of Seagroatt Floral Co. Inc.*, 167 A. 2d 586, the *Blake* court again held that the rate of interest and the terms and conditions of its application are discretionary matters for the court. In fact, the *Blake* court suggests that interest can be eliminated entirely in cases where the dissenters exhibit bad faith. *Id.* The dissenters cite no authority which would prohibit a court from assessing an interest rate upon less than the entire award for a specified period of time, so long as there is no abuse of discretion.

Dissenters argue that the Circuit Court awarded 'no interest'. The argument is factually flawed on its face. The circuit court, in fact, awarded some form of interest from the date of the vote taken on the proposed corporate action (August 31, 2001) through payment of the per share value awarded by the court. The court assigned varying interest rates to portions of the per share award over varying periods of time. For the period of time

running from August 31, 2001, through June 12, 2003, the Circuit Court assessed a zero interest rate on that portion of the award which represented the amount the corporation offered to pay in accordance with the dissenter's rights statute ($835.51 per share), but awarded a full ten percent (10%) on the remaining $116.86 per share that the corporation failed to offer during this same period of time.[2] The result is the equivalent of a blended interest rate that takes all of the circumstances and the actions of the parties into account. It takes into account the fact that the corporation had no funds capable of investment from August 31, 2001, through the day of sale, June 12, 2003, and the fact that the dissenters each received what they would have during this period of time had the proposed corporate action to which they objected not taken place.

The corporation at hand was never one that provided monetary returns or dividends to its shareholders. The farm was used for recreational and residential purposes by dissenters. Except for a distribution in 2001 of an insurance settlement from a barn fire, the shareholders received no cash distributions on their shares. Portions of the corporate farm and farmhouse were rented, but the rents did not cover expenses. From August 31, 2001 to the closing of the sale on the real estate on June 12, 2003, the operation of the corporation changed very little. Expenses exceeded revenues, the shareholders received no cash distribution on their shares, and dissenters made use of the corporate farm and farmhouse

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[2]The respondents repeatedly tried to expedite the payment of the monies it believed were owed to the petitioners. Respondents continually filed motions designed to have a Special Commissioner appointed and an appraisal hearing convened. After the judgment of April 6, 2006 was finally entered, the respondents even sought the permission of the court to tender the sums awarded into an account of the petitioners choice pending any appeal in order for the interest to stop running against a corporation upon which a constructive trust was imposed. The corporation was simply unable, under the terms compelled by a constructive trust, to make the interest which would be owing. The petitioners are now in control of the investment medium for the monies awarded to them. Interestingly, they did not invest it aggressively to earn interest rates equal to or greater than of the eight percent (8%) they seek, but instead deposited it into a certificate of deposit. *See* Bank Statement attached hereto as Exhibit "A".

in the same manner as they used it before through June 12, 2003. Dissenters continued to keep personal tangible personal property on the corporate farm, visit the farm for recreation, and in the case of Dissenter David R. Dodd, maintain a secondary (if not primary) residence at the farm until the day of closing in 2003.

Moreover, the dissenters' delay in challenging the appraised value was tactical. The Commissioner found:

> "...that the Plaintiffs were emotionally tied to the real estate, which is understandable, and attempted to do what they could over the years to retain the PRF "assets" of the company, including converting PRF to a Sub-Chapter S Corporation in order to forestall sale of PRF; One or more Plaintiffs had also made offers to purchase the shares of PRF (for less than the awarded $952.37 per share amount); One or more Plaintiffs has also made offers to individual shareholders to purchase "control" of PRF; One or more Plaintiffs had attempted to procure friendly buyers for PRF after it was for sale, with the intent to be able to retain part of the real estate for Plaintiffs' benefit. Plaintiffs appear to have made certain tactical decisions. They did not challenge the PRF appraisal until it became apparent that their bid to purchase the real estate (submitted after the contract of sale with another was signed) would fail. In effect, the Plaintiffs wanted the benefit of that appraisal when they were buyers, but hotly challenged it when they were unsuccessful in purchasing the real estate."

See Special Commissioner's Recommended Findings, December 5, 2005, p. 11 (parentheticals added).

The trial court also took into account that the dissenters' actions post litigation which were again designed to delay the closing on the sale of the farm and thus delayed the investment opportunity for all concerned, not just the dissenters.

For twenty-one (21) months after the August 31, 2001 vote on the proposed corporate action, until the June 12, 2003 closing on the farm, the corporation had no corporate monies to invest. During the twenty-one (21) months following the August 31, 2001 corporate

decision to sell, through the week of closing in June of 2003, the corporation held title to a farm which was encumbered by the dissenters' *lis pendens*. The Circuit Court was well aware of the *lis pendens* filed by the dissenters and the resulting counterclaim necessarily brought by the corporation to remove the cloud on the title to the real estate in order for the intended sale of the property to proceed. The trial court entered an Order on February 25, 2003, finding that the *lis pendens* was wrongfully filed and ordered its immediate removal. (A Petition for Writ was thereafter filed by the dissenters with this very Court, The West Virginia Supreme Court of Appeals. It was denied 4-1.)

A transcript from the hearing upon that matter establishes that the *lis pendens* was intentionally and willfully designed to thwart the corporation's sale of the farm and to extort a settlement from the bona fide third party purchaser (Wilson) which would let the dissenters keep the real estate or a portion thereof. The petitioners explained it to the trial court as follows:

> ...
> If the sale is allowed to proceed, which the *lis pendens* will currently prevent, there's no place to recover from.
> ...

See Transcript, Jan. 31, 2003, p. 10.

> ...
> MR. PENTONY: We've had an informal mediation where the defendants were present as well as Mr. Wilson was present.
> Frankly there tends to be agreements between the plaintiffs and defendants contingent upon the plaintiffs negotiating a deal with Mr. Wilson to retain some of the property, keep the corporation – in effect, the corporation in existence. I don't know how that's going to be affected by the Court's ruling today. I suspect it's going to eliminate a lot of the leverage the plaintiffs had with Mr. Wilson so I don't know what the result of it –
> ...

> MR. PENTONY: There's not much leverage on Mr. Wilson. When the *lis pendens* was in effect plaintiffs did have reason for him to keep listening is the way to say it I guess. Right now I don't know that they do.
> ...

See Transcript, Jan. 31, 2003, p.38.

For the dissenters to receive the eight percent (8%) interest they seek during the time they were wrongfully preventing the sale of the property and thereby preventing the corporation's receipt of the sale proceeds, would be a grave injustice. Not only would the dissenters benefit from unlawful conduct on their part, but its effect on the corporation would be punitive in nature.

The court again looked at the equities, in selecting an interest rate to be applied against the $835.51 per share portion following the sale of the farm on June 12, 2003 and the dissenters actual receipt of the proceeds.

Even the case law cited by dissenters recognizes that the award of interest is premised upon an inherent concept of fairness. According to the dissenters, interest is "intended to reimburse the dissenters for the lost use of their money during the pendency of the appraisal proceeding **while the corporation retained control and use of it**" *See* Plaintiffs' Memorandum Concerning Interest and Costs, p. 9, fn. 2. Here, the corporation did not retain control or use of the money. After closing on June 12, 2003, a constructive trust was imposed upon all the proceeds. Thus, the corporation was forced to place the proceeds in short term money market investments. The corporation did not have use of these bonds and disbursements to non-dissenting shareholders was also prohibited. From the sale of the farm on June 12, 2003 through October 2005, $33,804.14 in income was received by the constructive trust upon the weighted average balance of the sale proceeds of

$1,121,144.13, a rate of return of 3.02%. There was no loan or windfall of monies to the corporation as the dissenters suggest.

Even if a constructive trust had not been in place, eight percent (8%) is, by all reasonable indicators, more than the corporation could have earned in the market and not a reasonable return on investment for the period in question. For example:

1. From August 31, 2001 to October 31, 2005, the Dow Jones Industrial Average Index (the most widely accepted equity investment index) moved from 9,949.75 to 10,440.07, a rise of 4.93% over fifty months, the equivalent of 1.18% per year.
2. From September 2001 to October 2005, the prime rate as reported by the Federal Reserve Board floated from a low of 4% to a high of 6.75%, with a monthly weighted average of 4.8%.
3. For the years from and including 2001 through 2005, the market interest rate for short term demand loans as determined by the Internal Revenue Service based on the average market yield of federal short term obligations fluctuated from a high blended annual rate of 4.98% to a low blended annual rate of 1.52%, with an average blended annual rate for the five-year period of 2.87%.

It is the basic intent of the statute to provide the dissenters with the fair value of their shares adjusted for the time value of money. Thus, even if market rate interest were the only determining factor for fair and equitable interest, an average of the three indicators noted above, 2.68%, is a fair and equitable interest rate. An interest rate of eight percent is not fair and equitable.

West Virginia Code § 31-1-123 expressly directs that the market rate is not the only factor weighing into this decision. The trial court is to examine **ALL the circumstances** *Id.* Thus, the delay caused by the dissenters' position on legal issues and their unreasonable demands are also considerations. The per share value ultimately awarded was $583.88 per share less than dissenters' requested award of $1,536.25 and only $116.86 per share greater than the statutory offer of $835.51 originally made by the corporation shortly after the proposed corporate action in 2001 which gave rise to this litigation. The trial court also noted in its factual findings that the dissenters had the opportunity to receive an even greater per share value earlier in this litigation. Two (2) separate Offers of Judgment were filed by the corporation, both of which exceeded the per share value of the sum actually awarded. Thus, there was no benefit or strategic financial advantage to the corporation in delaying payment to the dissenters. Rather, the corporation was damaged by the unrealistic and exaggerated claims of the dissenters. Is it equitable to force the non-dissenting shareholders to pay interest they could not earn themselves just because a dissenter would not accept the fair sums repeatedly being offered? Courts have answered this in the negative even eliminating interest awards in their entirety when a party's demands were so grossly disproportionate to the amount actually awarded. *See Rose Hall Ltd., v. Chase Manhatten Banking*, 566 F. Supp.1558 (D. Del. 1983), aff'd 740 F. 2d 956 (3rd Cir. 1984); *E. I. Fleishmann Lumber Corp. v. Resources Corp.*, 114 F. Supp. 843 (D.Del. 1953).

The court also considered the actual earnings made by the corporation on the sale proceeds held in the constructive trust and the reasons for the same. From the date of sale on June 12, 2003 through March 1, 2006, the corporation earned 1.674% interest on the monies held in the constructive trust for the benefit of the dissenters. As a result of the

dissenters' demand for a constructive trust, the corporation could only invest the sale proceeds in short-term money market investments. Such investments provided the security and liquidity demanded by the dissenters, dictated by the circumstances they created, and required by the court order. After June 12, 2003, the corporation maintained the net sale proceeds in short term investments in order to (1) provide funds for substantial corporate tax payments ($455,580.00); (2) pay certain costs and expenses of ongoing litigation ($30,350.89); and (3) maintain the ability to immediately pay dissenters. Thus, an award of the actual interest earned (1.674%) upon the per share sum originally offered ($835.51 per share) and later held in the constructive trust sought by the dissenters following the closing of June 12, 2003, was well reasoned and certainly within the purview of the court's discretion.

Finally, the court's award of simple interest is consistent with the holding in *Hensley v. West Virginia Dep't of Health and Human Resources*, 203 W.Va. 456, 508 S.E. 2d 616 (1998). *Hensley* holds that in the absence of express statutory authority and in consideration of the general reluctance with which compound interest is awarded, a court is obliged to construe a statutory provision as authorizing simple interest, consistent with common law. "One of the axioms of statutory construction is that a statute will be read in the context of the common law unless it clearly appears from the statute that its purpose was to change the common law." Syl. Pt. 2, *Smith v. West Virginia State Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680 (1982).

The awards of interest made by the trial court have factual support of record and are the result of orderly reasoning and logical process.

B. The Appeal of the April 6, 2006 Order is Time Barred.

The dissenters have creatively represented this as an appeal from a final order of October 5, 2006. That order concludes the proceedings as to the interest rates to be awarded to the dissenters upon the fair value of their shares under the dissenter's rights statute.

However, dissenters also seek to bootstrap an appeal of the April 6, 2006, final order which concludes the proceedings as to the fair value of the corporate shares under the dissenter's rights statute. This appeal is untimely as to this matter and is time barred.

The April 6, 2006, Order is not interlocutory, but clearly intended as a final order upon the issue of the fair value of the dissenter's shares under the dissenter's rights statute and the factual findings underlying that value, including the value of the farm. Although the order does not state "that there is no just reason for delay" of an appeal, it entered a monetary judgment against the corporation from which the dissenters now claim post judgment interest began to run. If an order disposes of any issues of liability as against a party, its failure to contain the language of Rule 54(b) of the West Virginia Rules of Civil Procedure will not render it unappealable, so long as the ruling approximates a final order in its nature and effect. *See Durm v. Heck's Inc.,* 184 W.Va. 562, 401 S.E.2d 908 (1991); *Sisson v. Seneca Mental Health Retardation Council, Inc.*, 185 W.Va. 33, 404 S.E.2d 425 (1991).

> "Interlocutory decrees requiring money to be paid, or real estate to be sold, or the possession or title of property to be changed, or adjudicating the principles of the cause, and especially the last, very nearly, in their nature and effect, approximate final decrees, and it is often difficult to distinguish the line that separates them; consequently, if there be any sound policy in prescribing a limit to appeals from

> final decrees, the same policy must apply to such interlocutory decrees as possess the same right of appeal."

Taylor v. Miller, 162 W.Va. 265 at 269, 249 S.E.2d 191 at 194 (1978).

The Order of April 6, 2006, is just such an Order and its appeal period expired four (4) months after its entry. As no appeal was taken from it on or before August 6, 2006, it is time barred and may not be heard now.

C. Valuing the Farm at $1,400,000 as of August 31, 2001 is Not a Clearly Erroneous Act.

It is axiomatic that a reviewing court can only consider those matters made of record in determining whether a special commissioner, and the trial court adopting his recommended value, abused its discretion. *See Hensley*, 508 S.E.2d at 627 (quoting *Evans v. Huntington Publishing Co.*, 283 S.E.2d 854 (1981)) (per curium). The record in this proceeding does not, in any way, contain evidence of the presence or absence of deep river water adjacent to the farm, nor the economic impact of such. Similarly, dissenters' counsel's opinion as to the present or past temperament of the real estate market in the Eastern Panhandle is not evidence in this matter. The record contains only two (2) competing appraisals of the farm in question and an arms length negotiated contract of sale.

The relevant inquiry is whether the $1,400,000.00 value the Commissioner placed upon the farm was unsupported by any evidence of record and hence, clearly erroneous. The finding is clearly erroneous only if the reviewing court upon all of the evidence is left with the definite and firm conviction that a mistake has been committed. *See Public Citizen*, 480 S.E.2d at 538.

Contrary to the claims of the dissenters, the Commissioner and consequently the adopting trial court did not rely solely upon one appraisal, to the exclusion of the other, in making a factual finding as to the value of the farm. The corporation's appraiser (McPherson) testified to a value of $1,250,000.00 as of August 31, 2001, while dissenters' appraiser (McCray) testified to a value of $2,082,000.00 as of July 1, 2002. The Commissioner chose neither value. He valued the property at $1,400,000.00 as of August 31, 2001.

The Commissioner's value was derived from all the evidence as he aptly points out on page nine of his recommended findings. *See* Special Commissioner's Recommended Findings, p. 9. The Commissioner did not simply adopt the corporation's proffered appraisal as the fair market value of the farm. He did, however, find it to be "more probative". *Id* at p. 12.

The Commissioner's determination of the weight to be given to each of the competing appraisals was premised upon an evaluation of the appraisers' credibility. The Commissioner chose to substantially discount the McCray appraisal. The Commissioner's findings are explicit and telling in this regard. He states therein: "Moreover, it is obvious that David Dodd procured him as an appraiser for purposes of this litigation and had extensive contact with him throughout the appraisal process leading up to the publication of his final appraisal". *Id.* at p. 12. McCray testified that the appraisal was obtained for the purposes of "settling a dispute". It was to be used as a negotiation tool. The weight of the evidence also suggests that McCray inflated the value of the property in an effort to help his clients (the petitioners). McCray's handwritten notes (Respondent's Hearing Exhibit 9B) demonstrate that he computed fair market values for Potomac Riverside Farm using various

comparables and per acre sales prices which were later "scratched out" and disregarded, presumably when they failed to allow him to arrive at his preconceived and desired result. *See* Respondents' Hearing Exhibit 9B. These notes were in fact referred to by dissenters' counsel as the "smoking gun" exhibit and no explanation for these preliminary numbers was ever provided to the Commissioner by McCray.

Credibility was not the only factor taken into account. The evidence relied upon by the appraisers was also independently examined by the Commissioner. This is amply supported by the record as well. Commissioner Bean specifically indicates in his recommended findings that the appraisal of the dissenters' proffered expert, McCray, was found to be "less satisfying". *See* Commissioner's Recommended Findings, p.11. His recommended findings explain why: "Appraiser McCray did not satisfactorily account for flood plain, the effect of the railroad easement; and used a listing as a 'comparable'...." *Id.* at p.12. McCray also acknowledged that he disregarded the contract of sale between Potomac Riverside Farm and WV Hunter, LLC, a contract which was entered into prior to his retention and of which he was aware at the time he completed his appraisal. At the same time, he relied upon a mere listing as a comparable. *See* Special Commissioner's Recommended Findings, pp. 11-12. As McPherson testified, McCray thereby violated Standard Rule 1-5 of the Uniform Standards of Professional Appraiser Practice (USPAP). *Id.* In developing a real property appraisal, the Rule requires that an appraiser "analyze any current agreement of sale, option, or listing of the property, if such information is available to the appraiser in the normal course of business." *See id.*; Uniform Standards of Professional Appraiser Practice (USPAP), Standard Rule 1-5.

The Commissioner did not disregard, but considered, the contract of sale for the property as a factor in reaching a fair value for the farm. The contract of sale reflected what a willing buyer would pay for the property and was quite possibly the most probative evidence of the farm's fair market value. The contract of sale between the corporation and WV Hunter, LLC (Respondents' Hearing Exhibit 7B) was entered into on or about July, 2002. Settlement under the terms of that contract occurred on June 12, 2003 (Respondents' Hearing Exhibit 20B). This contract of sale was the result of arms length negotiations between unrelated parties who had no prior business dealings with one another and contained a sales price of $1,399,900.00.

The trial court recognized all of the above when adopting the Commissioner's recommended value and rejecting the dissenters' argument that the Commissioner misapprehended the law because he felt he had to select one appraiser over another. As the trial court stated, *"...the Commissioner did not strictly adopt one appraisal. Commissioner Bean's valuation of $1,400,000 differs from Mr. McPherson's appraised amount of $1,250,000. In addition, the Defendants urge that Commissioner Bean should have depreciated the property value. Therefore, even though both parties disagree with the Commissioner's valuation of the PRF farm, the court will adopt his recommendation which takes both appraisers views into account."* *See* Order, April 6, 2006.

WHEREFORE, the Appellees respectfully ask this Honorable Court to deny the Appellants' requested relief and to affirm the trial court's awarded per share value and interest.

VI. CROSS ASSIGNMENTS OF ERROR

A. The Court Erred in Assessing Costs Against the Corporation and in Denying an Award of Costs to the Appellees Pursuant to Rule 68(c).

Applicable Facts:

1. On June 27, 2003, the corporation executed a statutorily mandated offer per share to the dissenters in the amount of $835.51 per share. *See* Order, October 5, 2006, para. 19.

2. On February 10, 2005, the corporation made an offer of judgment pursuant to Rule 68, in the amount of $367,500.00 or $1,029.41 for each of the dissenters' 357 shares. *See* Order, October 5, 2006, para. 18.

3. On February 18, 2005, the corporation made an offer of judgment pursuant to Rule 68, in the amount of $414,500.00 or $1,161.06 for each of the dissenters' 357 shares. *See* Order, October 5, 2006, para. 20.

4. On April 6, 2006, the trial court upheld the Commissioner's recommended findings, in part, awarding the dissenters a fair value of $952.37 per share for a total award of $339,996.09. *See* Order, October 5, 2006, para. 33.

5. The determined fair value of $952.37 per share exceeded the corporation's statutory offer of $835.51 by $116.86 per share, but was $76.53 and $208.69 below the Rule 68 per share offers respectively.

Argument:

An award of costs pursuant to Rule 68(c) is not discretionary. The pertinent language of Rule 68 of The West Virginia Rules of Civil Procedure provides:

> (a) Offer of Judgment. At any time more than 10 days before the trial begins, a party defendant against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effects specified in his offer, with costs then accrued...
>
> (c) Offer Not Accepted. ...if the judgment finally obtained by the [plaintiff] is not more favorable than the offer, the [plaintiff] **must** pay the costs incurred after making of the offer....

W.Va. R. Civ. Pro. 68. (emphasis added).

The proper application of Rule 68(c) makes it mandatory for a trial judge to impose upon plaintiff all costs incurred after such an offer is made wherein the verdict is less favorable than the offer. *See King v. Ferguson*, 198 W.Va. 307, 480 S.E.2d 516 (W.Va. 1996) (per curium). In the *King* decision, the Court aligned itself with the majority of those other jurisdictions having similar statutes or court rules. *See Gasperin v. Reeves*, 664 So. 2d 1062 (Fla. App. 2 Dist. 1995) (a defendant who made a settlement offer which was rejected by plaintiff which was seventy-five percent (75%) in excess of the verdict ultimately returned to plaintiff was entitled to an order awarding fees and costs to defendant); *Severn v. Sperry Corp.*, 212 Mich. App. 406, 538 N.W.2d. 50 (1995) (holding that a party who accepts mediation evaluation may recover costs necessitated if that party does not succeed in obtaining a more favorable verdict); *Gaston v. Tillery*, 900 P.2d 1012 (Okla. App. 1995) (the trial court has no discretion to deny costs where defendant's offer of judgment was in excess of verdict); *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995) (holding that trial judge may make awards of costs, attorney fees and interest on judgment where there was a pretrial offer of judgment that was refused and a less favorable final judgment); *Hallow v. Filiyaro*, 526 N.W.2d 631 (Minn. App. 1995) (rule governing

settlement offers is designed to encourage settlement and offer is rejected and the judgment entered is less favorable than the offer, the offeree must pay).

Offers of judgment for $367,500 and $414,500 were made on February 10, 2005 and February 18, 2005, respectively. Judgment of $339,998.09 was entered on April 6, 2006. The judgment awarded was less than the offers extended fourteen (14) months earlier. Under Rule 68, the Appellees are thus entitled to an award of costs incurred following their offers.

The Court erred in denying an award of Rule 68 costs to the Appellees. It further exacerbated its error by assessing all costs of the appraisal hearing against the corporation. *See* Order, October 5, 2006. Under the holding of *King*, the trial court's denial of costs to the Appellees should be reversed and with express direction to the trial court to determine and award Appellees all costs incurred since February 10, 2005. The award of costs should be inclusive of all expert witness fees, commissioner fees, hearing room rental fees, court reporter fees, deposition costs, witness fees, service of process costs, and the like.

WHEREFORE, the Appellees respectfully ask this Honorable Court for a reversal of the trial courts award of costs against the corporation and an order directing the entry of an award of costs to the Appellees pursuant to Rule 68(c).

APPELLEES
By Counsel

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307 Rock Cliff Drive
Martinsburg, WV 25401
(304) 267-7270

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID R. DODD, DAVID E. DODD, and DIANN D. MARTIN,

Plaintiffs/ Petitioners herein,

vs.

Circuit Court of Berkeley County
Civil Action No. 02-C-320
Docket number 071070

POTOMAC RIVERSIDE FARM, INC.;
LOGAN D. WANNAMAKER, individually and as a Director of Potomac Riverside Farm, Inc.;
MARJORIE LEE WANNAMAKER, individually and as a Director Potomac Riverside Farm, Inc,;
NATIONAL CITY BANK, a foreign corporation doing business in West Virginia, as Trustee of Voting Trust Agreement of Potomac Riverside Farm, Inc. and as Trustee of Edwin D. Dodd Trust; and
SARAH D. KAUFFMAN, as President of Potomac Riverside Farm, Inc.

Defendants/ Respondents herein.

CERTIFICATE OF SERVICE

I, Tammy Mitchell McWilliams, Esquire, do hereby certify that an exact copy of the foregoing ***BRIEF OF APPELLEES, POTOMAC RIVERSIDE FARM, INC., LOGAN D. WANNAMAKER, MARJORIE LEE WANNAMAKER, and NATIONAL CITY BANK*** has been served upon the following via United States, First-Class Mail, postage prepaid mail on this 27th day of August, 2007.

Peter Pentony, Esquire
P.O. Box 487
Charles Town, WV 25414

William Powell, Esquire
P.O. Box 1068
Martinsburg, WV 25401

Tammy Mitchell McWilliams, Esquire #5779

BCT
Bank of Charles Town

COOP STAR Cirrus

Date 6/23/06 Page 1
Primary Account 3133664
Images 1

DAVID R DODD
BY TAMMY BITTORF AND PETER PENTONY
ESCROW AGENTS
PO BOX 487
CHARLES TOWN WV 25414-6657

BCT Customers can report lost or stolen ATM/Debit cards 24/7 by calling our TouchLine Banking Center at (304) 728-2424. From the main menu take option 6 then follow the instructions for reporting a lost or stolen card.

---- CHECKING ACCOUNTS ----

H PEAK PERFORMANCE MONEY MARKET

Account Number	3133664	Number of Images	1
Previous Balance	.00	Statement Dates 6/22/06 thru	6/25/06
1 Deposits	339,996.09	Days This Statement Period	4
Checks/Charges	.00	Average Ledger	339,996
Service Charge	.00	Average Collected	339,996
Interest Paid	139.72	Interest Earned	139.72
Current Balance	340,135.81	Annual Percentage Yield Earned	3.82%
		2006 Interest Paid	139.72

Deposits and Additions

Date	Description	Amount
6/22	DDA REGULAR DEPOSIT	339,996.09
6/25	INTEREST PAID 4 DAYS	139.72

Daily Balance Information

H Date	Balance	Date	Balance
6/22	339,996.09	6/25	340,135.81

*** END OF STATEMENT ***

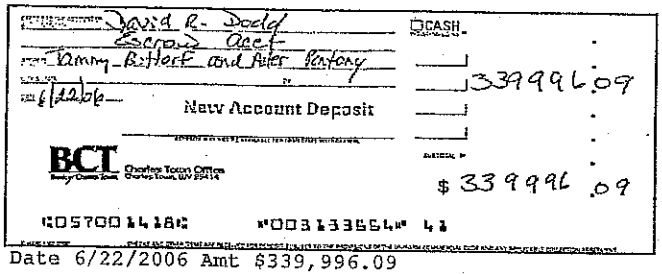
EXHIBIT
tabbies
A

PLEASE EXAMINE AT ONCE, if no error is reported within ten days, the account will be considered correct. Please notify bank in writing of changes of address.

MEMBER F.D.I.C.

USE REVERSE SIDE FOR RECONCILING YOUR ACCOUNT

BCT it's still about service.
Bank of Charles Town


David R. Dodd
Escrow Acct
Tammy Bittner and Peter Pastore
6/22/06
CASH
339996.09
New Account Deposit
BCT Charles Town Office
$ 339996.09
⑆057001418⑆ ⑈0031335544⑈ 43

Date 6/22/2006 Amt $339,996.09

Bank of Charles Town
111 East Washington Street
Charles Town WV 25414

Date: 6/29/06

COPY

DAVID R DODD
BY TAMMY BITTORF AND PETER PENTONY
ESCROW AGENTS
PO BOX 487
CHARLES TOWN WV 25414-6657

The following transactions have posted to your accounts in accordance with your CDARS agreement with Bank of Charles Town. Debit Transactions are listed for funding of your CDARS account. Credit Transactions are listed for interest payments and principal maturities.

Debit Transactions

3133664	Checking	340,134.81
	Total Debits	340,134.81

Credit Transactions

Total Credits	.00

CDARS Funding New Account

Please adjust your records to reflect the transactions indicated above. If you have any questions regarding these transactions, please feel free to contacts us at (304) 725-8431.

Sincerely,

Bank of Charles Town